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In The

Supreme Court of the United States

Toyota Motor Manufacturing, Kentucky, Inc.

Petitioner

vs.

Ella Williams

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE, LEVI STRAUSS & CO., IN SUPPORT OF PETITIONER

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Brief Amicus Curiae

This amicus *curiae* brief is submitted in support of the Petitioner Toyota Motor Manufacturing, Kentucky, Inc. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.[1]

Interest of the Amicus Curiae

Levi Strauss & Co. ("LS&CO.") is one of the world's largest brand-name apparel marketers with 1999 sales of $5.14 billion. LS&CO. manufactures and markets branded jeans and casual sportswear under the Levi's®, Dockers®, and Slates® brands. LS&CO. employs approximately 9,300 people in the United States; worldwide, LS&CO. employs 17,000 people.

LS&CO. currently has 21 production facilities and 25 customer service centers throughout the world. LS&CO., headquartered in San Francisco, California, has domestic apparel manufacturing facilities in California, Georgia, Tennessee and Texas, distribution facilities in Arkansas, Kentucky, Mississippi and Nevada, and retail outlets or regional offices in Arizona, California, Illinois, Massachusetts, Michigan, Missouri, New York,

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[1] Counsel for a party did not author this brief in whole or in part. No one, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief. Counsel for the parties have given their written consent for the filing of this amicus curiae brief as required by Rule 37.3(a). Copies of the written consents accompany this brief as required by Rule 37.3(a).

North Carolina, Texas, Virginia, Washington, and Wisconsin.

LS&CO.'s commitment to worker health and safety pre-dates government-mandated programs. In 1998, LS&CO. received the Ron Brown Award for Corporate Leadership, the first Presidential Award to honor companies for outstanding achievements in employee and community relations. The preamble to the Occupational Safety and Health Administration's Ergonomics Program, 65 Fed. Reg. 68261 (Nov. 14, 2000), describes LS&CO. as one of the "workplaces with the best ergonomics programs in place" (65 Fed. Reg. at 68300, col. 3, Tr. 14730) and states that the LS&CO. ergonomics program is one of the "[m]odel programs that contain OSHA's program elements" (65 Fed. Reg. at 68319, col. 2, Tr. 14707; see also 65 Fed. Reg. at 68284, col. 3). Discussion of LS&CO.'s "successful ergonomics ... program" (65 Fed. Reg. at 68306, col. 3; Tr. 14707) is also set forth at 65 Fed. Reg. 68307, col. 3, Tr. 14707; 68310, col. 2, Tr. 14707, 68311, col. 3, and 68313, col. 3, Tr. 14715-16. In this regard, for example, the OSHA ergonomics standard discussed LS&CO.'s use of symptoms of musculoskeletal disorders as one means by which the company evaluates a job for "ergonomic risk factors," with a view toward possible modification of the job to reduce risk prior to the possible occurrence of an injury. 65 Fed. Reg. at 68311, col. 3 – 68312 col. 1.[2]

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[2] The OSHA ergonomics standard was invalidated by Public Law 107-5, 115 Stat. 7 (March 20, 2001). Thereafter, the U.S. Department of Labor decided to hold three public forums in July of 2001 "to discuss possible approaches to addressing ergonomic hazards in the workplace." 66 Fed. Reg. 31694 (Jun. 12, 2001); *see also* 66 Fed. Reg. 33578 (Jun. 22, 2001).

LS&CO.'s products are made by individuals who have the ability to perform repetitive motion, manual tasks. According to the decision of the Sixth Circuit, an individual could be "disabled" under the ADA if the individual experiences "limits on manual activities which can affect other major life activities." *Williams v. Toyota Motor Manufacturing, Kentucky, Inc.*, 224 F.3d 840, 844 (6th Cir. 2000) *cert. granted* ___ U.S. ___, 121 S.Ct 1600 (2001). If upheld, the Sixth Circuit's decision would significantly increase the impact and obligations on almost every employer, including LS&CO., covered by the ADA.

The Sixth Circuit's decision would permit any individual to maintain an ADA claim as long as they could show they are unable to perform "manual tasks associated with working." *Id.* Yet, under the Sixth Circuit's standard, the employee would not have to demonstrate that they are unable to perform a class of jobs or a broad range of jobs in various classes, as would otherwise be required for the employee to establish a substantial limitation of the major life activity of working. LS&CO. believes Congress never intended the ADA would allow employees to maintain claims simply because the employee is limited in being able to perform some of the manual tasks required by their job.

Summary of the Argument

Part I of LS&CO.'s amicus brief will show that the court of appeals definition of "disability" is not only unwarranted – based upon the statutory text as well as the legislative history of the ADA, 42 U.S.C. § 12102(2)(A), and the Rehabilitation Act of 1973, as

amended, 29 U.S.C. § 705(20)),[3] -- but that it is unnecessary, given the other means by which an individual may establish that he or she is entitled to ADA protection.

In Part II of this amicus brief, LS&CO. will describe the medical nature of carpal tunnel syndrome, its typical impact on those individuals who are treated for it and how the syndrome has been addressed in the courts of appeal.

Argument

I

"The ADA seeks to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity." *Cleveland v. Policy Management Systems, Inc.*, 526 U.S. 795, 801 (1999) (citing 42 U.S.C. § 12101(a)(8), (9)).[4] During consideration by Congress, the official

[3] The Rehabilitation Act definition of "handicapped individual" has migrated several times. Originally codified at 29 U.S.C. § 706(6), by the time the ADA was enacted it was found at § 706(8), *see* Pub. L. 101-336, § 512, 104 Stat. 327, 376 (§ 512 of the ADA), to its present location (with a name change to "individual with a disability"), 29 U.S.C. § 705(20), accomplished as part of Public Law 105-220, § 403, 112 Stat. 936, 1093; *see also* 29 U.S.C. § 705(9), defining "disability."

[4] The use of the phrase "*unwarranted* discrimination" in *Cleveland* illustrates the difference between the ADA and other anti-discrimination statutes, such as section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3, and the Age Discrimination in Employment Act, 29 U.S.C. § 623(a). While these (and numerous other) statutes prohibit discrimination because of a protected characteristic or activity, the ADA, like

title of the ADA was a bill to establish a "clear and comprehensive prohibition of discrimination on the basis of disability." S. 933, 101st Congress, 1st Session; *cf.* Pub. L. 101-336, 104 Stat. 327. Nine years of litigation under the ADA has shown that Congress was more successful in establishing a "comprehensive prohibition" against disability discrimination than it was in providing a "clear" prescription as to which individuals are entitled to protection under the ADA.[5]

The definition of "disability" has, at least at times, challenged employees, employers and the courts. Petition for Certiorari, p. 15-17, *see, e.g., Williams*, 224 F.3d at 842 ("The ADA is unclear as to when it should be applied to protect an employee. . . ."); *Gelabert-Ladenheim v. American Airlines, Inc.*, ___ F.3d ___, 2001 WL 640175 (1st Cir. 2001) ("lack of predictability is an unfortunate artifact of ADA law").

The ADA contains a three-part definition of "disability:"

the Rehabilitation Act, does not require employers "to disregard the disabilities of handicapped individuals . . . ." *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979). Rather, the "mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context." *Id.*

[5] The Court recently recognized that the "comprehensive national mandate" the ADA calls for refers to the prohibition of "discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III)." *PGA Tour, Inc. v. Martin*, 532 U.S. ___, 121 S.Ct. 1879, 1889 (2001).

> The term 'disability' means, with respect to an individual—
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). This definition is virtually identical to the definition of "handicapped individual" in the Rehabilitation Act of 1973, as it was amended in 1974. 29 U.S.C. § 701, *et seq.*

As originally enacted, the Rehabilitation Act of 1973, defined the term "handicapped individual" in the following manner:

> Any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and II of this Act.

Pub. L. 93-112, § 7(6), 87 Stat. 355.

The Rehabilitation Act Amendments of 1974 added the definition that (with minor changes in terminology and phrasing) came to be adopted by the ADA:

> For purposes of Titles IV and V of this Act, the term "handicapped individual" means

> any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

Pub. L. 93-516, § 111(a), 88 Stat. 1617 (amending § 7(6) of the Rehabilitation Act of 1973, codified at 29 U.S.C. § 706(6) (1982)). Congress stated the revised definition was necessary because the existing definition:

> has proven to be troublesome in its application to provisions of the Act such as sections 503 and 504 because of its orientation toward employment and its relation to vocational rehabilitation services.

S. Rep. No. 93-1297 (2nd Sess. 1974); *reprinted in* 1974 U.S.C.C.A.N. 6373, 6388. The Senate Report explained:

> The amended definition eliminates any reference to employment and takes cognizance of the fact that handicapped persons are discriminated against in a number of ways. First, they are discriminated against when they are, in fact, handicapped. . . . Second, they are discriminated against because they are classified or labeled, correctly or incorrectly, as handicapped. . . Third, they are discriminated against if they are regarded as handicapped, regardless of whether they are in fact handicapped. . . .

Clause (A) in the new definition eliminates any reference to employment and makes the definition applicable to the provision of Federally-assisted services and programs. Clause (B) is intended to make clearer that the coverage of sections 503 and 504 extends to persons who have recovered – in whole or in part – from a handicapping condition, such as a mental or neurological illness, a heart attack, or cancer and to persons who were classified as handicapped (for example, as mentally ill or mentally retarded) but who may be discriminated against or otherwise be in need of the protection of sections 503 and 504.

Clause (C) in the new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as title VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority. This subsection includes within the protection of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within clause (A) in the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped.

1974 U.S.C.C.A.N. at 6389-90, *see also id.* at 6413-14, explaining that the definition originally enacted as part of the Rehabilitation Act was:

> far too narrow and constricting when removed from the context of trying to focus on the needs of individuals for vocational rehabilitation services in connection with a vocational goal. Thus, a new definition has been developed which would provide sufficient latitude (but still not be totally open ended). . . .

The Court, in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), also explained the purpose of the 1974 amendment:

> The amended definition reflected Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from "archaic attitudes and laws" and from "the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps." S. Rep. No. 93-1297, p. 50 (1974). To combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of "handicapped individual" so as to preclude discrimination against "[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all."

Southeastern Community College v. Davis, 442 U.S. 397, 405-406, n. 6 (1979).

* * *

> By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

480 U.S. at 284; *accord Sutton v. United Airlines Inc.*, 527 U.S. 471, 489 (1999). The Seventh Circuit, in *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 541 (7th Cir. 1995), explained that the "regarded as" definition of disability "actually makes a better fit with the elaborate preamble to the Act, in which people who have physical or mental impairments are compared to victims of racial and other invidious discrimination. Many such impairments are not in fact disabling but are believed to be so, and the people having them may be denied employment or otherwise shunned as a consequence." *See* 42 U.S.C. § 12101(a)(7); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 884-85 (6th Cir. 1996)

With few modifications,[6] the tri-part definition of handicap in the Rehabilitation Act remained in place and ultimately provided the basis for the definition of "disability" in the Americans with Disabilities Act of 1990.

As the Court recognized in *Sutton*, 527 U.S. at 484, before the 101st Congress enacted the Americans with Disabilities Act of 1990, the 100th Congress took up consideration of the "1988 precursor," the "Americans with Disabilities Act of 1988," S. 2345, 100th Cong. (2nd Sess. 1988); H.R. 4498, 100th Cong. (2nd Sess. 1988) ; *see generally* 134 Cong. Rec. 9,375 (April 28, 1988); 134 Cong. Rec. 9,600 (April 29, 1988)).

The definition of "handicap" in S. 2345 was materially broader than the definition of "disability" in the Americans with Disabilities Act of 1990. Section 3 of S. 2345 defined "handicap" as follows:

> (1) On the Basis of Handicap. – the term "on the basis of handicap" means because of a physical or mental impairment, perceived impairment, or record of impairment.
> (2) Physical or Mental Impairment. -- the term "physical or mental impairment" means –

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[6] *See, e.g.*, Public Law 95-602, § 122(a), 92 Stat. 2955, 2984-85, amending the definition of "handicapped individual" in 29 U.S.C. § 706(6) to exclude an individual who is an "alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others."

(a) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more systems of the body, including the following –

(i) the neurological system;
(ii) the musculoskeletal system;
(iii) the special sense organs, and respiratory organs, including speech organs;
(iv) the cardiovascular system;
(v) the reproductive system;
(vi) the digestive and genitourinary systems;
(vii) the hemic and lymphatic systems;
(viii) the skin; and
(ix) the endocrine system; or

(b) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(3) perceived impairment. -- the term "perceived impairment" means not having a physical or mental impairment as defined in paragraph (2), but being regarded as having or treated as having a physical or mental impairment.

(4) record of impairment. – the term "record of impairment" means having a history of, or

having been misclassified as having, a physical or mental impairment.

134 Cong. Rec. at 9,379; *see also* 134 Cong. Rec. 9,600 (introduction of H.R. 4498).[7]

S. 2345 would have eliminated the requirement that to have a disability, an individual must have an impairment that "substantially limits one or more of the major life activities of such individual." Instead, any individual who had a "physical or mental impairment" would have been included in the protected class under S. 2345. The distinction between the two definitions was recognized in *Sutton* with the following explanation:

> By its terms, the ADA allows employers to prefer some physical attributes over others and to establish physical criteria. . . . Accordingly, an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment--such as one's height, build, or singing voice--are preferable to others, *just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job.*

Sutton, 527 U.S. at 490-91 (emphasis added); *accord Albertson's Inc. v. Kirkingburg*, 527 U.S. 555, 565

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[7] S. 2345 was introduced on April 28, 1988, during the waning days of the 100th Congress (when the vast majority of legislators were preparing for the 1988 Presidential election, political conventions, and their own re-election campaigns). S. 2345 was referred to the Senate Committee on Labor and Human Resources. 134 Cong. Rec. at 9,375.

(1999) ("only impairments causing 'substantial limitat[ions]' in individuals' ability to perform major life activities constitute disabilities.")

There is, in the legislative history of the ADA, no report explaining why the definition in S. 2345 was discarded. It is clear, however, that the members of the 101st Congress were more comfortable with the familiar definition of disability used in the Rehabilitation Act. *See* 42 U.S.C. § 12201(a); *Bragdon v. Abbott*, 524 U.S. 624, 631-32 (1998) (§ 12201(a) "requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act.").[8]

At least one commentator has implied that the definition in S. 2345 was not intended to be significantly different from the manner in which the drafters of the ADA believed courts would interpret the definition of "disability" contained therein. C. Feldblum, "*Definition Of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*" 21 Berkeley J. Employment & Lab. L. 91, 92 & 127-28 (2000).

[8] S. Rep. No. 101-116, at 16 (1st Sess. 1989), stated that the term "disability" should be applied in the same manner as the term "individual with handicaps" was used in Rehabilitation Act regulations issued by the Department of Health, Education, and Welfare in 42 Fed. Reg. 22685 (May 4, 1977), and by the Department of Housing and Urban Development pursuant to the Fair Housing Amendments Act of 1988. 54 Fed. Reg. 3232, 3288 (Jan. 23, 1989). (An identical statement appears on page 50 of H. R. Rep. 101-485(II)). The definition of "individual with handicaps" in these regulations is indistinguishable from the Equal Employment Opportunity Commission's definition of "disability" in 29 C.F.R. pt. 1630.

Professor Feldblum asserts that when the ADA was introduced into the 101st Congress:

> Political advocates for people with disabilities in Washington preferred Silverstein's approach [to use the Rehabilitation Act definition] because, as a strategic matter, it seemed smarter to use a definition of disability that had fifteen years of experience behind it, rather than to attempt to convince Congress to adopt a new, untested definition. Moreover, although there had been, as noted above, a few adverse judicial opinions under Section 504 that had rejected coverage for plaintiffs with some impairments, those opinions were the exception, rather than the rule, in litigation under the Rehabilitation Act.

Id. at 128.[9]

Professor Feldblum targets three Rehabilitation Act decisions as "exceptions to the rule:" *Jasany v. United States Postal Service*, 755 F.2d 1244 (6th Cir. 1985); *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); and *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088,

[9] Professor Feldblum does not take the position that courts should more broadly interpret the definition of "disability" in the ADA. Rather, Professor Feldblum wrote the article to attempt to explain how "those of us who helped draft the ADA [could have] so completely misread how the courts would apply its definition of disability[.]" Feldblum, 21 Berkeley J. Employment & Lab. L. at 93. Professor Feldblum ultimately proposes that Congress should amend the ADA to, among other things, incorporate the definition set forth in S. 2345. *Id.* at 162.

1099 (D. Haw. 1986).[10] These decisions were not "exceptions to the rule" because they were among the few Rehabilitation Act decisions to have actually considered whether an impairment substantially limited one or more major life activities. *See, e.g., Daley v. Koch*, 892 F.2d 212, 215 (2nd Cir. 1989).[11]

Of course, the Court's decision in *Arline* resolved a significant coverage issue with respect to whether individuals who have contagious diseases were protected by the Rehabilitation Act. But nothing in the above decisions is inconsistent with *Arline* which relied upon the second part of the definition of "handicapped individual" in holding that the employee had a "record" of a substantially limiting impairment and upon the third part of the definition in holding that an individual who has a contagious disease may be "regarded" as having a substantially limiting impairment because of the attitudes of

[10] Professor Feldblum's assertion that these cases are exceptions to the rule appears to rely upon the following research: "A Westlaw online search revealed that from 1980 to 1989, 930 cases were filed under Section 504 of the Rehabilitation Act. Only 22 of those cases cited *E.E. Black*." Feldblum, 21 Berkeley J. Employment & Lab. L. at 113, n. 114.

[11] Other Rehabilitation Act decisions holding that an individual failed to meet the definition of a "handicapped individual" included *Harris v. Adams*, 873 F.2d 929 (6th Cir. 1989) (on-the-job violence and asthma); *Evans v. City of Dallas*, 861 F.2d 846 (5th Cir. 1988) (knee injury); *Santiago v. Temple University*, 739 F.Supp. 974 (E.D.Pa. 1990) (partial vision loss in one eye); *cf. Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987) (citing cases holding that epilepsy is a handicap). In many decisions, the issue was not contested. *See, e.g., Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983).

others towards the individual with the handicap. 480 U.S. at 281-85.[12]

There are few references in the legislative history of the ADA regarding whether a particular impairment constitutes a disability under the first part of the definition in the Americans with Disabilities Act. There are at least three rational explanations for this. First, it is reasonable to assume Congress was aware of the manner in which the Rehabilitation Act had been interpreted. *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI . . . we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI. . . ."); *Cf. Bragdon*, 524 U.S. at 631-32. As in *Cannon*, Congress repeatedly referenced the Rehabilitation Act during the consideration of the ADA. If in fact the courts were divided in how they had construed the definition of "disability" (as the commentator suggests) it is unlikely that Congress would have ignored this controversy in all of the seven Senate, House or Conference reports issued during consideration of the ADA.[13]

[12] The Court declined to address the "regarded as" claim in *Bragdon* because the Respondent had not asserted it in the lower courts. 524 U.S. at 658 n.1.

[13] The 101st Congress published the following reports on the ADA: S. Rep. 101-116 (August 30, 1989); H. Rep. 101-485 (parts 1 through 4) (May 15, 1990); Conf. Rep. 101-596 (July 12, 1990); Conf. Rep. 101-558 (June 26, 1990).

Congress' adoption of the "individualized" approach rather than the categorical approach, *cf. Cleveland*, 526 U.S. at 806 (discussing "presumption" method used in SSDI adjudications), is another reason extended discussion of the intended scope of "disability" protection was unnecessary. Congress eschewed any attempt to set forth a comprehensive list of "impairments," much less disabilities. S. Rep. No. 101-116, p. 22 (1st Sess. 1989) (refusing to provide a list of "impairments" but stating that physical characteristics are not impairments). In *Sutton* the Court held that "whether a person has a disability under the ADA is an individualized inquiry." 527 U.S. at 483 (citing *Bragdon*, 524 U.S. at 642); *see id.* at 657 (Rehnquist, C.J., concurring in relevant part); *PGA Tour, Inc. v. Martin*, 532 U.S. ----, 121 S.Ct. 1879, 1896 (2001); *see also* 29 CFR pt. 1630, App. § 1630.2(j). Congress recognized that it was unnecessary to compile even an illustrative list of covered disabilities.[14]

The 101st Congress also emphasized the importance of the third "regarded as" part of the

[14] During the House debate, Rep. Burton expressed a "concern about the entire concept" of the ADA because he believed it would create "900 classes of disabled or handicapped people." 136 Cong. Rec. H4,613.(daily ed. July 20, 1990). In response to this claim, Rep. Bartlett, one of the House members of the conference committee, put together a "frequently asked questions" statement which emphasized that the "ADA does not cover 900 classes of disability. The ADA includes a functional rather than a medical definition of disability. An individual with a disability is one who--has, has a record of, or is regarded as having--a physical or mental impairment that substantially limits a major life activity. (Sec. 3(2) 1) This is the identical definition that has been in disability discrimination law for Federal contractors since 1973." 136 Cong. Rec. H1,920 (daily ed. May 1, 1990).

definition of disability. For example, in discussing the "regarded as" prong, Senate Report 101-116 states:

> Another important goal of the third prong of the [disability] definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation."
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> * * *
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> A person who is excluded from any activity covered under this Act or is otherwise discriminated against, because of a covered entity's negative attitudes toward that person's impairment is treated as having a disability. Thus, for example, if an employer refuses to hire someone because of a fear of the "negative reactions" of others to the individual, or because of the employer's perception that the applicant has an impairment which prevents that person from working, that person is covered under the third prong of the definition of disability.

Id., at 24 (citing *Arline*, 480 U.S. at 284); *see also* H. R. Rep. No. 101-485(II), at 93 (1990).

In *Arline*, the Court recognized that the Rehabilitation "Act is carefully structured to replace

. . . reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments." 480 U.S. at 285. The statutory definition of "disability" is already broad enough to accomplish the goal of prohibiting unwarranted discrimination. Even if an individual is not significantly impaired by an impairment, that individual is still protected if the individual is "regarded as" having a substantially limiting impairment.

In *Arline*, for example, the "prejudiced attitudes or the ignorance of others" was the type of "reflexive reaction" (to a disability) Congress meant to remedy (in the Rehabilitation Act). The Court found the employee had been "regarded as" having a substantially limiting impairment because the adverse employment action had been based upon an unfounded belief that other individuals would react negatively to a teacher who had had a contagious disease.

In contrast, United Airlines' adoption, in *Sutton*, of an uncorrected 20/100 visual acuity hiring criteria for its global airline pilots was not based upon negative reactions of others nor did the hiring criteria preclude the applicants from working in other jobs related to their skills. 527 U.S. at 492-93. In *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999), the employee's blood pressure rendered him unable to perform his current job as a commercial mechanic for UPS but there was no proof that UPS believed the employee's high blood pressure prevented him from performing other jobs as a mechanic. 527 U.S. at 522.

The Sixth Circuit ostensibly held Respondent, Ella Williams, was disabled because she was substantially limited in the major life activity of performing "manual tasks." The court, however, characterized her impairments as preventing her "from doing the tasks *associated* with *certain types* of manual assembly line jobs, manual product handling jobs and manual building trade jobs (painting, plumbing, roofing, etc.) that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." *Williams*, 224 F.3d at 843 (emphasis added). Despite holding that the inability to perform manual tasks "seriously reduces her ability to perform the manual tasks that are job-related," *id.* at 844, the court of appeals refused to consider whether plaintiff was substantially limited from "working" saying that it was a major life activity of "last resort." The court of appeals decision unnecessarily burdened the definition of "disability" with its "notion" of a "class . . . based on a more limited concept than 'working,'" in favor of finding that "limits on manual activities which can affect other major life activities" can constitute a disability under the ADA. *Williams*, 224 F.3d at 844.

By construing the first part of the definition of disability to include impairments that "can affect other major life activities," the court of appeals created a "major life activity" consisting of manual tasks related to a particular assembly line job. Under this approach, an individual could be adjudicated "disabled" based upon the idiosyncratic

functions of the job the individual had been attempting to perform. [15]

Resolving the disability issue is daunting enough as it is. Congress never intended for employees or employers to have to guess at whether an individual has a disability. The ADA was meant to provide a "clear . . . prohibition" against disability discrimination. *Supra* p. 5.

II

LS&CO. believes the Court should be provided with an explanation of the nature of carpal tunnel syndrome. According to the National Institute of Health:

> Approximately 1 percent of individuals with carpal tunnel syndrome develop permanent injury. The majority recover completely and can avoid reinjury by changing the way they do repetitive movements, the frequency with which they do the movements, and the

[15] The Sixth Circuit has, in fact, compounded this error in subsequent decisions: *Henderson v. Ardco, Inc.*, 247 F.3d 645, 652 (6th Cir. 2001) (holding that if the employer "perceived [plaintiff] to be *approximately as impaired as Williams*, then [plaintiff] states a valid 'regarded as' claim."); *Kiphart v. Saturn Corporation*, 251 F.3d 573 (6th Cir. 2001) (holding employee's "impairments substantially limited his ability to perform an entire class of manual activities associated with assembly-line and product-handling jobs involving the use of vibrating hand-held power tools and requiring frequent, repetitive twisting, bending, or flexing of the wrists, elbows, or neck.")

> amount of time they rest between periods when they perform the movements.

The National Institute of Neurological Disorders and Stroke, National Institutes of Health, "Carpal Tunnel Syndrome Information Page." http://www.ninds.nih.gov/health_and_medical/disorders/carpal_doc.htm (June 20, 2000)

The National Institute of Health has explained the medical reason for carpal tunnel syndrome:

> Carpal tunnel syndrome is caused by pressure exerted on the median nerve at the wrist. The median nerve supplies sensation to the thumb-side of the palm, and to the thumb, index finger, middle finger, and the thumb-side of the ring finger. It also supplies movement to part of the hand. The nerve enters the hand through a gap formed by the wrist bones (called the carpal bones) and the tough membrane that holds the bones together (the transverse carpal ligament). This gap is called the carpal tunnel. The passageway is rigid, so swelling of any of the tissues in this area can cause compression of the nerve (this is also called entrapment of the nerve).

http://www.nlm.nih.gov/medlineplus/ency/article/000433.htm (May 16, 2001); *see also* 65 Fed. Reg. at 68460.

In January of 2001, the National Academy of Sciences ("NAS") published a study of

"musculoskeletal disorders" ("MSD").[16] Congress directed the NAS to "conduct a study of all the available scientific literature examining the cause-and-effect relationship between repetitive tasks in the workplace and musculoskeletal disorders." H. R. Rep. No. 105-635, at 131-32 (1998).[17] The NAS MSD Study concluded that "although there is a risk of long-term disability in both types of disorder [low back and upper extremities], the majority of individuals return to work within 31 days." NAS MSD Study 31.

Citing a study by a "working group" with the National Institute of Arthritis and Musculoskeletal and Skin Diseases, the NAS MSD Study found that as of 1990, 37.9 million people, or 15 percent of the entire U.S. population, suffered from one or more chronic musculoskeletal disorders. The Arthritis Institute study further found that, due to the demographic shift, i.e., the aging of the "baby boom" generation, approximately 59.4 million people, or 18.4 percent of the population, will have chronic musculoskeletal disorders by the year 2020. NAS MSD Study 39.

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[16] The official title of the study is: National Research Council and the Institute of Medicine (2001) *Musculoskeletal Disorders and the Workplace: Low Back and Upper Extremities.* Panel on Musculoskeletal Disorders and the Workplace. Commission on Behavioral and Social Sciences and Education. Washington DD: National Academy Press. A full text version is available on the Internet at http://www.nap.edu.

[17] Funding for the NAS MSD Study was authorized by H.R. 4274, 105th Cong. (2nd Sess. 1998), ultimately passed as part of Public Law 105-277, *see* H. R. Rep. No. 105-825, at 369 (1998).

Statistics for the upper extremities indicate that annually, 1.87 million people report having carpal tunnel syndrome, while 588,000 report having tendinitis or related syndromes. NAS MSD Study 54.

One of the panel members on the NAS MSD Study, Jeffrey N. Katz, MD, MS, was the principal author of a separate study entitled "Predictors of Outcomes of Carpal Tunnel Release," 44 Arthritis & Rheumatism, 1184 (May 2001), in which he (and his co-authors) analyzed post-operative satisfaction rates for 188 (responding) patients who had had "carpal tunnel release" surgery performed. Katz reported that "[t]wo-thirds of the patients reported being completely or very satisfied with the outcomes of surgery at 6, 18, and 30 months postoperatively." Katz further reported that the "strongest predictors of less favorable outcomes are worse scores on patient-reported measures of upper extremity functional limitation and mental health status, alcohol use, the involvement of an attorney." *Id.* Katz distinguished the "attorney effect" from patients who pursued a claim for workers compensation which, Katz found, "was not associated with significantly worse outcomes unless an attorney was involved." *Id.* at 1191.

Applying the "individualized inquiry" (either expressly or implicitly) the courts of appeals have found that individuals who have carpal tunnel syndrome are not individuals with a "disability." Most of the decisions have considered claims alleging substantial limitations of the major life activity of "working."

In *Gelabert-Ladenheim v. American Airlines, Inc.*, ___ F.3d ___, 2001 WL 640175 (1st Cir. 2001), the First Circuit held that a plaintiff who worked as a gate and ticket agent at the San Juan, Puerto Rico, airport was not an individual with a disability. Even though the plaintiff was unable to lift more than thirty pounds, push or pull more than twenty pounds, sit or stand longer than eight hours, or type more than one to two hours without a break, she failed to provide proof that she was significantly restricted in her ability to perform a class of jobs. The court faulted the plaintiff's evidence because she had only provided "generic evidence of her work restrictions, e.g., no intense typing or heavy lifting, without showing how these restrictions substantially limit her ability to work in the San Juan area given her education, training, skills, abilities, and employment history."

In *Chanda v. Engelhard/ICC*, 234 F.3d 1219 (11th Cir. 2000), the employee's ADA claim failed because his tendinitis only rendered him unable to perform a narrow range of manual tasks that caused pain in his wrist. The employee was able to perform daily activities, including dressing himself, driving, and attending classes or working in a position requiring computer usage.

In *McKay v. Toyota Motor Mfg, U.S.A., Inc.*, 110 F.3d 369, 370 (6th Cir.1997), the Court held that the plaintiff's inability to perform repetitive-motion factory work because of carpal tunnel syndrome was not a significant limitation of the major life activity of working. The court of appeals found that the impairment disqualified the plaintiff from only a narrow range of repetitive-motion positions and not

from working in the broader class of manufacturing jobs.

In *Broussard v. Univ. of Cal. at Berkeley*, 192 F.3d 1252, 1259 (9th Cir. 1999, the Ninth Circuit upheld summary judgment in the employer's favor because the plaintiff who claimed her carpal tunnel syndrome was a disability had merely shown that she was unable to perform the "specialized job of animal technician for the transgenic mice."

In *Gutridge v. Clure,* 153 F.3d 898, 901 (8th Cir.1998), the court of appeals held that a computer service technician who, because of carpal tunnel syndrome, was unable to perform his previous job that involved lifting and moving computers but who was able to work as a computer service technician was not significantly restricted in the major life activity of working. *See also Helfter v. United Parcel Service, Inc.*, 115 F.3d 613 (8th Cir. 1997) (inability to perform sustained repetitive action with either hand and heavy lifting not enough to show issue of fact about substantial limitation in life activity of work); *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir.1995) (plaintiff was not substantially limited in major life activity of working where plaintiff was restricted to lifting items weighing less than 20 pounds and from working in cold environment.)

Where carpal tunnel syndrome has been found to be a significant impairment of the major life activity of working, the common factor has been that the symptoms all but precluded the employee from using the employee's hands and the employee, by reason of other social factors, such as education, experience or geographic location, was unable to find work in a

field for which the employee had the necessary training or skills. *See Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 11-12 (1st Cir.1999); *DePaoli v. Abbott Laboratories, Inc.*, 140 F.3d 688, 673 (7th Cir. 1998); *Wellington v. Lyon County Sch. Dist.*, 187 F.3d 1150, 1155 (9th Cir.1999).

Conclusion

A holding in favor of the Respondent in this case would likely require employers to assume an employee is "disabled" when an employee is physically (or even mentally) unable to perform all or part of a job's requirements. This would be true no matter how many other jobs the employee was able to perform. Requiring an employer (and an employee) to have to resolve whether a work-related function, specific to a particular job, is a "subset" of some other major life activity would make the task of deciding whether someone has a disability significantly broader and more complicated than Congress ever intended it to be.

Levi Strauss & Co. believes the court of appeals improperly (and unnecessarily) expanded the definition of "disability" under the Americans with Disabilities Act. For these reasons, Levi Strauss & Co. submits the Court should reverse the decision of the court of appeals.

Respectfully submitted,

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